

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY K. GRAHAM, ET AL.

v.

UNIVERSAL HEALTH SERVICE, INC. :

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CIVIL ACTION NO. 20-5375

ORDER

This 15th day of June 2021, deeming Defendant's correspondence to the court (ECF 26) as a Motion to Strike Plaintiffs' Notice of Voluntary Dismissal, (ECF 25), for the reasons that follow, the Motion is **DENIED**.

Although the Court permitted discovery on the threshold issue of standing, its order did not address the ultimate merits of the case, and the parties were not given adequate notice that the motion was converted to one for summary judgment. *See Finkelman v. National Football League*, 810 F.3d 187, 202 n.97 (3d Cir. 2016) (citing *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 288 (3d Cir. 1999)). Defendant's motion has not been converted, as the sixty-day period set for discovery has not expired and the parties have not received a "reasonable opportunity" to present evidence. *Id.*

Defendant raises compelling arguments, but they are foreclosed by the Third Circuit's unequivocal language in the matter of *In re Bath and Kitchen Fixtures Antitrust Litigation*, 535 F.3d 161, 166 (3d Cir. 2008). The Court of Appeals both adopted a literal approach to Rule 41 and criticized the Second Circuit for purporting to find exceptions to the rule. *Id.* n.10 (declining to endorse *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953)). Because

Defendant has not served an answer or a summary judgment motion, under binding Third Circuit authority, Plaintiffs may voluntarily dismiss this action without prejudice. *See In re Bath*, 535 F.3d at 165.

/s/ Gerald Austin McHugh
United States District Judge